



November 29, 2001

Mr. J. David Dodd, III
Nichols, Jackson Dillard, Hager & Smith
1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201

OR2001-5548

Dear Mr. Dodd:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155421.

The City of Richardson (the "city") received a request for the following information:

- 1). The Front-Page Arrest Information Report or Basic Arrest Information Report or Structured Offense report and the arresting officer's narrative report if [such] report is not included in the Front-Page Arrest Information Report or Basic Arrest Information Report or Structured Offense report pertaining to any person who was arrested for failure to identify (Texas Penal Code Section 38.02) by the Richardson Police Department during the years 1999, 2000 and 2001.
- 2). A detailed description of the offense pertaining to all persons arrested during the years 1999, 2000 and 2001.

You state that the request is "extremely onerous and broad," and inform us that the total number of arrests for the time period in question is 8435. You state that it is possible that more documents would have to be reviewed in order to identify which documents contain

the requested information.¹ You state that due to the voluminous nature of the requested information, city staff cannot review the information within the 10-day time period for requesting a decision from this office set forth at section 552.301(b) of the Government Code. However, you state that "in an abundance of caution," the city is requesting a ruling from this office as to whether the requested information is excepted from disclosure. In this regard, you claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

We first note that the city has a good faith duty to relate a request to information held by it. Open Records Decision No. 561 at 8 (1990). At least to the extent that the records have not been determined to be subject to an exception to required public disclosure, we believe this good faith duty requires a governmental body to make an exhaustive search for those records that contain information responsive to a request. Moreover, it has long been established that the difficulty of complying with a public information request is not a relevant factor in determining whether the responsive information is excepted from required public disclosure. *See, e.g., Industrial Found. v. Texas Industrial Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); *see also* Attorney General Opinion JM-672 (1987) (the difficulty or cost of complying with a public information request does not determine whether the information is available to the public). Thus, the fact that it would be difficult for the city to research its case files and locate those records that contain responsive information is irrelevant to whether such records are excepted from required

¹We note that the Government Code provides at section 552.2615 that, under certain circumstances, a governmental body must provide a requestor an itemized statement detailing all charges that will be imposed. The statement must be provided if the cost of providing requested copies of or access to the requested public information will exceed \$40. If an alternative, less costly, method of viewing the records is available, the statement must advise the requestor that he may contact the governmental body regarding such alternative method. If the governmental body anticipates that costs of complying with a request will be such that it will be required to send such a statement, it must inform the requestor that he must provide the governmental body a mailing address, facsimile transmission, or electronic mail address to which the statement may be sent. The governmental body must also inform the requestor that the request will be considered withdrawn if he does not timely and properly respond to the statement or an updated statement by mail or in person, or by facsimile transmission or electronic mail if the governmental body can receive documents transmitted in such a manner. The request will be considered withdrawn if the requestor does not, within ten days after the date a statement is sent to him, respond in writing that he accepts the charges or is modifying his request. *See* Gov't Code § 552.2615. We further note that, if the requestor has been provided with the statement of estimated costs required under section 552.2615, an officer for public information may require a deposit or bond for payment of anticipated costs under certain circumstances. *See* Gov't Code § 552.263.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

public disclosure. It appears that the city has determined that the sample submitted records are among the types of records held by the department that contain information responsive to the requests. Accordingly, this decision addresses the exceptions raised with respect to the submitted samples.

Next, we note that, pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why any stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You did not, however, explain to us how the exceptions you raised would apply to the requested information, other than to state that you are raising sections 552.103 and 552.108 "for all pending cases."

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Compelling reasons exist when the information is made confidential by law or affects the interest of a third party. Open Records Decision No. 630 at 3 (1994). Section 552.103 does not constitute a compelling reason to overcome the presumption of openness. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475, 476 (Tex. App.--Dallas 1999, no pet.) (stating that governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (general discussion of discretionary exceptions), 542 at 4 (1990) (stating that statutory predecessor to section 552.103 does not implicate third-party interests and may be waived by governmental body). Nor does section 552.108. *See* Open Records Decision No. 177 at 3 (1977) (governmental body may waive statutory predecessor to section 552.108). Thus, the city may not withhold the requested information under these sections, with the following exception. We note that the current request encompasses some of the information that was ruled on by this office in Open Records Letter No. 2001-5405 (2001), namely, all records relating to arrests for certain offenses from August 17, 2001 to August 21, 2001. We thus conclude that you must rely on that ruling as a previous determination and withhold the records relating to arrests for certain offenses from August 17, 2001 to August 21, 2001 in accordance with ORL 2001-5405. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely the same information as was addressed in prior attorney general

ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). The application of sections 552.101 and 552.130, however, presents compelling reasons to overcome the presumption of openness. Therefore, we will apply sections 552.101 and 552.130 to the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. A portion of the information submitted for our review is CHRI generated by TCIC and NCIC. Accordingly, this information, which we have marked, is excepted from required public disclosure by section 552.101 of the Government Code. (See yellow flags).

Section 552.101 also encompasses the doctrine of common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. *See also* Open Records Decision No. 659 at 4-5 (1999) (summarizing types of information that are protected by rights of privacy). In addition, this office has found that personal financial

information not relating to the financial transaction between an individual and a governmental body is protected by common law privacy, *see* Open Records Decision Nos. 600 (1992), 545 (1990). Further, where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). We find that a portion of the submitted information, which we have marked, is excepted from disclosure under section 552.101 and common law privacy. (See yellow flags).

Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold under section 552.130 the Texas driver's license numbers, vehicle identification numbers, and license plate numbers appearing in the submitted information.

The submitted information also contains social security numbers. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

The submitted materials also includes fingerprint information that is subject to sections 559.001, 559.002, and 559.003 of the Government Code. These new statutes were enacted by the Seventy-seventh Legislature and took effect September 1, 2001. *See* Act of May 24, 2001, 77th Leg., R.S., H.B. 678, § 2 (to be codified as Gov't Code §§ 559.001, .002, and .003). They provide as follows:

Sec. 559.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
 - (A) the individual consents to the disclosure;
 - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
 - (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and
- (2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

It does not appear to this office that section 559.002 permits the disclosure of the submitted fingerprint information to the requestor. Therefore, the city must withhold the fingerprints contained in the submitted materials under section 552.101 in conjunction with section 559.003 of the Government Code.

To summarize, a portion of the information submitted for our review is CHRI generated by TCIC and NCIC which must be withheld under section 552.101. We have marked this information. We have marked additional information that is protected by common law privacy and must also be withheld under section 552.101. Texas driver's license numbers,

vehicle identification numbers, and license plate numbers appearing in the submitted information must be withheld under section 552.130. Social security numbers must be withheld under section 552.101 if maintained by the city pursuant to any provision of law enacted on or after October 1, 1990. Fingerprints contained in the submitted materials must be withheld under section 552.101. Records relating to arrests for certain offenses from August 17, 2001 to August 21, 2001 may be withheld in accordance with ORL 2001-5405 (2001). The remainder of the requested information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, reading "Michael A. Pearle". The signature is fluid and cursive, with the first name "Michael" being the most prominent part.

Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 155421

Enc. Submitted documents

c: Mr. Fred Slice
2406 Diamond Oaks
Dallas, Texas 75044
(w/o enclosures)